NO. 4147

In the

United States Circuit Court of Appeals

For the Ninth Circuit

February Term, 1924.

C. F. PETERSON,
Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error

No. 4147.

Upon Writ of Error to the United States District Court for the Territory of Alaska, Third Division

Brief for Defendant in Error

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Statement of the Case

Appellant, C. F. Peterson was accused on September 21, 1922 of unlawful possession of whiskey commonly called "white mule," in violation of the Act

of Congress known as the Alaska Dry Law, before Hon. W. H. Rager in Commissioner's Court for Knik Precinct, Third Division, Territory of Alaska. The complaint by C. W. Mossman, Deputy United States Marshal, charging him is herein set forth:

"In the United States Commissioner's Court for Knik Precinct, Third Division, Territory of Alaska.

UNITED STATES OF AMERICA No.

vs.

C. F. PETERSON.

"Complaint for the Violation of the Act of Congress, Approved February 14th, 1917, Known as the Alaska Dry Law.

(Filed Sept. 21, 1922.)

C. F. Peterson is accused by C. W .Mossman, Deputy United States Marshal, in this complaint of the crime of having intoxicating liquor in his possession, committed as follows:

The said C. F. Peterson, on the 21st day of September, A. D. 1922, in Knik Precinct, in the Territory of Alaska, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully have in his possession intoxicating liquor, to wit, whiskey, commonly called "white mule," in violation of the provisions of the Act of Congress, approved February 14th, 1917, commonly known as the Alaska Dry Law, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

(Signed) C. W. MOSSMAN.

United States of America,

Territory of Alaska, ss.

I, C. W. Mossman, being first duly sworn, upon oath depose and say that the foregoing complaint is true; and that I am a deputy United States marshal for the Third Division of the Territory of Alaska.

(Signed) C. W. MOSSMAN.

Subscribed and sworn to before me this 21st day of Sept., 1922.

(Seal)

(Signed) W. H. RAGER,

U. S. Commissioner and Ex-Officio Justice of the Peace."

On September 27, 1922, defendant was tried by said commissioner and Justice of the Peace, a jury having been waived, and was found guilty and sentenced to serve one year in jail and to pay a fine of $1000.00. From this judgment and sentence defendant appealed to the District Court for the Territory of Alaska, Third Division, and was thereupon again tried, before a jury, on November 28, 1922, and convicted and was thereafter sentenced under such conviction on December 15, 1922, to one year in the federal jail at Anchorage, Alaska, and to pay a fine of $1000.00. On this conviction defendant sues out this writ of error, containing ten assignments, which may be grouped as follows:

I.

Jurisdiction of the Court.

II.

Error in Admission of Evidence.

III.

Insufficiency of Evidence.

IV.

Error of Court in refusing Plea in Bar.

With the exception of the Plea in Bar the points raised in this case are identical with those raised in Number 4146, another appeal before this court by the same appellant. This brief is based upon the assignments of error and not upon the points of appellant's brief for the reason that the same has not been served. It is now the 10th day of February, and it will be impossible to await the service of such brief, which could not arrive for at least one week by the mail. The United States Attorney is required to be present in this court at San Francisco on March 5th. It will, therefore, be seen to await the arrival of such brief the Government would not have sufficient time by any means to prepare brief, have it printed, make the journey to San Francisco,

and file same three days before the case is called for argument, under the rule, hence, as before stated, the reason for basing this brief upon the assignments of error of appellant.

POINTS AND AUTHORITIES

Authority or right of any person other than officer to make complaint.

People vs. Stickle, (Mich) 121 NW 497
16 Corpus Juris, Page 289, Sec. 497.
State vs. Howard (NH) 43 Atl. 592.
United States vs. Skinner, 27 Fed. Cas. No. 16,309.
State vs. Giles (Maine) 64 Atl. 619.
Com. vs. Murphy, (Mass.) 18 NE 418.
Com. vs. Alden (Mass.) 9 NE 15.
State vs. Woodmanse, (R. I.) 35 Atl. 961.
Wooten vs. State, (Tex) 121 SW 703.

A person convicted of violating the Alaska Dry Law, an Act of Congress approved February 14, 1917, cannot (1) be imprisoned in the penitentiary nor at hard labor; cannot (2) be imprisoned for a longer term than one year on a single charge; therefore (3) the offense is a misdemeanor, and can (4) be prosecuted under an information or complaint, as well as by indictment of a Grand Jury.

(1) Alaska Dry Law, Sections 1, 24, etc.
In Re Mills, 135 U. S. 263.

In Re Bonner, 151 U. S. 242.
Horner vs. State, 1 Oreg. 267.
Brooks vs. People, 24 Pac. 553 (Col.)

(2) **Alaska Dry Law, Sections 1, 24, etc.**
Ex Parte Jackson, 96 U. S. 727.
In Re MacDonald, 33 Pac. 20 (Wyo.)—distinguishing Ex Parte Rosenheim, 23 Pac. 372 (Cal.)
State vs. Baxter 21 Pac. 650 (Kan.)—citing in Re Boyd, 9 Pac. 240.
Ex Parte McGee, 54 Pac. 1091 (Oreg.)
In Re Newton, 58 N. W. 436 (Neb.)
Ex Parte Bryant, 4 S. 854 (Fla.)
Bailey vs. State, 6 S. 398 (Ala.)
Ex Parte Bolling, 31 Ill. 96
Davis vs. State, 22 Ga. 101.

(3) **Alaska Dry Law, Sections 1, etc.**
Compiled Laws of Alaska, 1913, Section 2065.
Act of March 4, 1909, C. 321, Sec. 336, 35 Stat. 1152; Barnes Federal Code, Sec. 10,038.

(4) **Alaska Dry Law, Sections 18 and 28.**
U. S. vs. Powers and Robertson, 1 Alaska 180, and cases cited on page 184.
John H. Breede vs. James M. Powers, U. S. Marshal, Sup. Ct. No. 45—Oct. Term, 1923 (Unreported to date).
Young vs. U. S. 272 Fed. 967 (9th Cir.)
U. S. vs. Achen, 267 Fed. 595 (E. D., N. Y.)
U. S. vs. Quaritus, 267 Fed. 227.
U. S. vs. Metzgar, 270 Fed. 291.

The Congress of the United States has authority to pass legislation making the possession of intoxicating liquor a crime, and the Alaska Dry Law is valid.

Binns vs. United States, 194 U. S. 490-1.
Street vs. Lincoln Safe Deposit Co. (S. D. N. Y.) 267 Fed. 706—See also same in 254 U. S. 88.
Rose vs. U. S. (6th Cir.) 274 Fed. 245.
U. S. vs. Murphy, (E. D. N. Y.) 264 Fed. 842.
Massey vs. U. S. (8th Cir.) 281 Fed. 293.
Page vs. U. S. (9th Cir.) 278 Fed. 41.
Jacob Ruppert vs. Caffey, 251 U. S. 264.
Abbate vs. U. S. (9th Cir.) 270 Fed. 735.
Simms vs. Simms, 175 U. S. 168.
Mormon Church vs. United States, 136 U. S. 1-42.
National Bank vs. County of Yankton, 101 U. S. 129-132.
Koppitz vs. United States, 272 Fed. 96.

The complaint under which defendant was convicted states facts sufficient to constitute a crime.

Cabiale vs. U. S. (9th Cir.) 276 Fed. 769, see par. 2.
Young vs. U. S. (9th Cir.) 272 Fed. 967.
Massey vs. U. S. (8th Cir.) 281 Fed. 293.
Heitler vs. U. S. (7th Cir.) 280 Fed. 703.
Strada vs. U. S. (9th Cir.) 281 Fed. 143.
Laurie vs. U. S. (6th Cir.) 278 Fed. 934.
Feigin vs U. S. (9th Cir.) 279 Fed. 107.
U. S. vs. Everson (S. D. Fla.) 280 Fed. 126, distinguishing Dowling case
Vesely vs. U. S. (9th Cir.) 275 Fed. 693.
Millich et al. vs. U. S. (9th Cir.) 282 Fed. 604.
Herine vs. U. S. (9th Cir.) 276 Fed. 806.
Kathriner vs. U. S. (9th Cir.) 276 Fed. 808.

A search warrant is unnecessary to search an automobile, boat or other vehicle where the officer mak-

ing the search has reasonable grounds to believe that contraband intoxicating liquors are being carried therein.

Lambert vs. U. S. 282 Fed. 413 (9th Cir.)
U. S. vs. Bateman, 278 Fed. 231 (S. D. Cal., N. D.)
U. S. vs. Fenton, 268 Fed. 221 (D. Mont.)
Boyd vs. U. S., 286 Fed. 930 (4th Cir.)
Bell vs. U. S., 285 Fed. 145 (5th Cir.)
McBride vs. U. S., 284 Fed. 416 (5th Cir.)
U. S. vs. Rembert, 284 Fed. 996 (S. D. Tex.)
Houck vs. State, 140 N. E. 112 (Ohio).
Elrod vs. Moss, 278 Fed. 123 (4th Cir.)
Vachina vs. U. S., 283 Fed. 25 (9th Cir.)
U. S. vs. Snyder, 278 Fed. 650 (N. D., W. Va.)
O'Connor vs. U. S., 281 Fed. 396 (D., N. J.)
U. S. vs. Vatune, 292 Fed. 497 (N. D. Cal., S. D.)
Ex Parte Morrill, 35 Fed. 261 (Cir. Ct. Oreg.)
U. S. vs. Welsh, 247 Fed. 239 (S. D., N. Y.)

Statements and conversations made to a Deputy U. S. Marshal or other officer, either before or after arrest, which were voluntary, and not induced by duress, intimidation or other improper influences, are admissable, and the officer may testify to them at the trial.

Perovich vs. U. S., 205 U. S. 86.
Wilson vs. U. S., 162 U. S. 613.
Mangum vs. U. S., 289 Fed. 213 (9th Cir.)
Murray vs. U. S., 288 Fed. 1008 (Ct. of App., D. C.)
Murphy vs. U. S., 285 Fed. 801 (7th Cir.)

Wiggins vs. U. S., (2nd Circuit) 272 Fed. 41.
State vs. Brinkley, 105 Pac. 708 (Oreg.)
State vs. Crowder, 21 Pac. 208 (Kan.) See Par. 2 and cases there cited.

Admissions admitted by trial Judge in the exercise of his discretion will not be disturbed unless there is apparent and manifest error.

Rogoway vs. State, 78 Pac. 987.
State vs. Humphrey et al 128 Pac. 824 (Oreg.)
State vs. Morris, 163 Pac. 567 (Oreg.) See par. 5-6.
Mangum vs. U. S. 289 Fed. 213 (9th Cir.)

The Court, in the instructions to the jury, correctly stated the law of "possession"; there was "substantial" evidence that defendant was the possessor of the intoxicating liquor; the weight of the evidence is for the jury, and Appellate Courts will not disturb the verdict.

Compiled Laws of Alaska, 1913, Sec. 2266.
Rev. St. Sec. 1011, Comp. St., Sec. 1672.
Page et al vs. U. S. (9th Cir.) 278 Fed. 41.
Rose vs. U. S. (6th Cir.) 274 Fed. 245.
Waddel vs. U. S. (8th Cir.) 283 Fed. 409.
Laurie vs. U. S., 278 Fed. 934 (6th Cir.)
Penn Casualty Company vs. Whiteway et al, 210 Fed. 782 (9th Cir.)

A plea in bar claiming merger can only be made

after a conviction. There can be no merger of offenses of same grade.

Section 2209 Alaska Code
16 Corpus Juris, Page 59, Sec. 10.
Vol. 1 Whart Crim. Law, Page 50, Sec. 39.
Berkowitz vs. United States, 93 Fed. 452.
Sec. 1, Alaska Dry Law.
Sec. 26, Title 2, Natl. Pro. Act.
Brewster vs. State, (Ind.) 151 NE 54.

ARGUMENT

Appellant questions the sufficiency of the complaint in this case on the ground that C. W. Mossman does not sign the complaint in an official capacity. In the first place we think the contention is without merit for he has made the complaint as deputy marshal. In the very first paragraph (Record page 6) defendants are accused "by C. W. Mossman, Deputy United States Marshal." This is repeated in the verification, but assuming that he has not sufficiently described himself, he has the same right as any other person to make complaint. Section 27 of the Alaska Dry Law makes it the duty of certain officials to enforce the Act, among them, of course, marshals and deputies, but nowhere can it be shown that they are given exclusive jurisdiction of making complaints,

and unless they are given exclusive jurisdiction, anyone can make a complaint.

16 Corpus Juris, Page 289, Sec. 497, states that the rule that complaints may be made by any person is of long standing and further, on page 290 in the same section is the following language:

"But the mere fact that certain officers are authorized to make complaint does not necessarily give them the exclusive right to do so."

In People vs. Stickle, Mich. 121 N. W. 498, a well considered case where defendant was convicted of wife desertion, it is contended that only the Superintendent of the poor could make the complaint, the court said:

"And the rule that one who is a competent witness and has knowledge of the facts may make complaint in a criminal case, permits the wife to be the complaining witness in this case. No good reason has been suggested for holding that because a superintendent of the poor or a county agent may make the complaint, it was intended to give them the exclusive right to initiate proceedings."

In State vs. Howard (N. H.) 43 Atla. 592, where defendant was charged with keeping a dog without a license in violation of a State Law, wherein the Mayor of each City and the selectmen of each town are required to make complaint against owners or

keepers, it was contended that no other persons could make complaints, that the court held:

"Any person may make a complaint under Section 8 or kill an unlicensed dog under Section 11, but it is a special duty of the officers to whom warrants have been issued to do both and again it is the general policy of the laws that any person who has probable cause for believing that another has committed a crime shall be at liberty to make complaint against the defendant."

For these reasons, that the complaint does show the signature of the officer, also that anyone can sign the complaint who knows the facts, we contend that the proposition is entirely without merit.

The Alaska Dry Law in Section I and all other parts of the Act specifically states that a violation of the provisions of the Act is a misdemeanor and in Section 28, which provides the machinery for prosecutions of violations of the Act, we find the following:

"Section 28. That prosecutions for violations of the provisions of this Act shall be on information filed by any such officer before any justice of the peace or district judge, or upon indictment by any grand jury of the Territory of Alaska, and said United States district attorney or his deputy shall file such information upon the presentation to him or his assistants of sworn information that the law has been violated; and in such prosecutions anyone making a false oath to any material fact shall be deemed guilty of perjury."

It seems, in view of the above provision and the long line of decisions interpreting statutes whose terminology is similar to that found in the Alaska Dry Law, that there is no doubt about the class of offense committed by a violation of the provisions of the Act, nor about the method of prosecuting such offenses. But plaintiff in error contends that error was committed in that he was tried under a criminal information and not by an indictment returned by a Grand Jury. The Supreme Court of the United States has long held that one convicted of a crime cannot be imprisoned in the penitentiary nor at hard labor unless the Act under which the prosecution is had specifically provides and authorizes that manner of imprisonment. This principle was laid down in the case of In Re Mills, 135 U. S. 263, where the court, page 270, says:

"A sentence simply of 'imprisonment' in the case of a person convicted of an offense against the United States—where the statute prescribing the punishment does not require that the accused shall be confined in the penitentiary—cannot be executed by confinement in a penitentiary, except in cases in which the sentence is for a period longer than one year."

In the case of In Re Bonner, 151 U. S. 242, this principle is again laid down and In Re Mills cited

with approval. On pages 254 and 255, the Court says:

"It follows that the court had no jurisdiction to order an imprisonment, when the place is not specified in the law, to be executed in a penitentiary when the imprisonment is not ordered for a period of longer than one year at hard labor."

Section 2065, Compiled Laws of Alaska, 1913, defines a misdemeanor as a crime not punishable by death or by imprisonment in the penitentiary, and Section 336, Chap. 321 of the Act of March 4, 1909, (35 Stat. 1152) is to the same effect in that it defines a misdemeanor as a crime not punishable by death nor by imprisonment for a term exceeding one year, the statute reading as follows:

"All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

Indeed it seems to be the contention of plaintiff in error that a violation of the provisions of the Alaska Dry Law constitutes a felony or infamous crime, and, therefore, that the offender may be prosecuted only by the indictment of a grand jury, on the ground that imprisonment under the Alaska Dry Law may be for a period exceeding one year. But the Act

itself specifically and clearly states otherwise. Nowhere throughout the Act is a penalty of imprisonment for more than one year provided. So that appellant's contention seems to rest upon the supposition that where a sentence of imprisonment in jail for a term of one year is administered, and in addition to that a fine is assessed, that the total term of imprisonment might be more than a year in case the defendant should be imprisoned for the purpose of collecting the fine.

The courts of the United States have held uniformly in a long line of decisions that imprisonment because of non-payment of a fine is merely a method of enforcing the payment of the fine and constitutes no part of the penalty administered for the violation of the law.

In Ex Parte McGee, 54, Pac. 1091, the Supreme Court of Oregon held that imprisonment to enforce the payment of a fine is no part of the penalty itself, stating its decision in the following words:

"The imprisonment is merely a prescribed mode of enforcing the payment of the fine, and, as we have seen, constitutes a step in the code of criminal procedure to be pursued in all cases involving the imposition of a fine. The punishment permitted by the charter and fixed by the ordinance is imprisonment or fine, or both. All beyond is mere mode or man-

ner of enforcement. The first can only be satisfied by serving out the prescribed term in prison, while the latter may be satisfied by payment of the fine imposed; but for the coercion of that payment the statute has prescribed a mode of procedure, which is to commit the accused to prison for a term not exceeding one day for every two dollars of the fine. The mode and manner of enforcing the punishment should not be confounded with the punishment itself, or regarded as a part of it."

In a case brought under the National Prohibition Act this Court, in Young vs. United States, 272 Fed. 967, held that the offense charged was a misdemeanor and was rightfully prosecuted by information, holding that this is the established law of the Federal jurisdiction. And since then the Supreme Court of the United States in the case of John H. Brede vs. James M. Powers, decided, on October 22, 1923, No. 45, October Term, 1923, (not reported to date) that prosecutions under the National Prohibition Act may be brought by information, since the offense is not infamous, and since the Act itself authorizes prosecution by information.

It will be noticed that in the Brede case an offense under the National Prohibition Act was involved. Under that Act the punishment may, under some conditions be imprisonment up to a period of five years.

The case at bar involves an offense under the

Alaska Dry Law, which does not authorize imprisonment in a penitentiary nor at hard labor, and the Alaska Dry Law differs from the National Prohibition Act in respect to the length of possible imprisonment by making one year the maximum. This, it seems to us, brings the case at bar squarely within all the decisions holding that offenses under similar acts may be prosecuted by information.

Constitutionality or Legality of the Alaska Dry Law.

Appellant in his first assignment of error claims Congress is without authority to pass legislation making the possession of intoxicating liquor an offense. This matter we think has been disposed of by this court, but we desire to call the attention of the court to the case of Binns vs. United States, 194 U. S. 490-1, as follows:

"It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories."

This is a case arising under the Act of Congress imposing trade licenses on certain businesses from Alaska.

In Simms vs. Simms, 175 U. S. 168, involving an action for divorce for want of jurisdiction, the court said:

"In the Territories of the United States, Congress has the entire dominion and sovereignty, national, and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state."

In Mormon Church vs. United States, 136 U. S. 1-42, involving the abrogation of charter of the Mormon Church under Act of Congress, the court said:

"The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the Territory or other property belonging to the United States."

National Bank vs. County of Yankton, 101 U. S., 129-132, involving the right of counties and townships under a Dakota Territorial Act to vote bonds. The court said:

"Their relation to the general government is much the same as that which counties bear to the respective states, and Congress may legislate for them as a state does for its municipal organizations."

In the case of Abbate vs. United States, 270 Fed.

275, this court held the Bone Dry Law in force in the Territory of Alaska, the court saying:

"In enacting the Bone Dry Law * * * Congress was pursuing its policy of prohibition in Indian Territory."

In Koppitz vs. United States, 272 Fed. 96, this court again upheld the Alaska Bone Dry Law and declared it in force.

As shown by the foregoing cases and many others Congress has plenary power to legislate upon all matters of government for a territory. If the contention be that they have not, then who has? Many territories and in fact almost all of them have been governed by congressional legislation for years after their acquisition and no legislature organized or authorized. If they did not have authority over this subject, then it would exist nowhere because Congress is the sole repository of legislative power in Territories. Certainly the organization of the legislature under Congressional law would not change the matter for the legislature derives no authority except that conferred by Congress.

As to constitutionality of such legislation, the foregoing cases show that this power has been settled and legislated upon by Congress for many years.

We therefore think the contention is without merit.

ADDENDUM

Since the preparation of this brief and after the same is in the hands of the printers the following information was received by wire from attorney for Plaintiff in Error:

"Will contend both cases: amendment National Prohibition Act November twenty-three, Nineteen Twenty One, supersedes Alaska Bone Dry Law."

The phrase "both cases" above evidently refers to this case and to case No. 4146, also before this court, by the same appellant. The Amendment to the National Prohibition Act, approved November 23, 1921, is the "Act Supplemental to the National Prohibition Act," commonly called the Anti-Beer Bill.

It is hard to see on what grounds it can be claimed that the Act Supplemental to the National Prohibition Act supersedes the Alaska Dry Law. Section 1 of the Amendment is a section of definitions. Section 2 of the Amendment provides that only spirituous and vinuous liquors may be prescribed for medicinal purposes, and relates to the conditions under which such may be shipped into the United States for non-beverage purposes. Section 3 applies the Amendment and the National Prohibition Act to the Territories, specifically mentioning Hawaii and the Virgin Islands, and

confers jurisdiction on their courts. Section 4 grants authority to the commissioner to formulate regulations to make the Amendment effective. Section 5 provides that all laws relating to the regulation and taxation of the traffic in intoxicating liquors that were existent at the time the National Prohibition Act was enacted shall continue in force and effect—unless the same are directly in conflict with that act or with the Amendment. Section 6 provides penalties for illegal searches in certain cases, etc.

Since the Alaska Dry Law itself provided only for the use of "pure alcohol" for "scientific, artistic or mechanical purposes or for compounding or preparing medicines," (Sections 2, 3, 4, 5, 6, 7, 10, 11, 12, Alaska Dry Law) and "wine for sacramental purposes," (Sections 8 and 9, Alaska Dry Law) and, hence, by its terms, exclusions and prohibitions made prescribing beer for medicinal purposes illegal, it is quite evident that the principal purpose of the Supplemental Act can have no repealing effect on the Alaska Dry Law.

If, by some stretch of imagination, Section 3 of the Amendment is claimed to effect the validity of the Alaska Dry Law, we contend that the answer is obvious. It has never been questioned that the National Prohibition Act applied to Alaska. It was con-

tended in Abbate vs. U. S., 270 Fed. 735, and in Koppitz vs. U. S., 272 Fed. 96, that the Alaska Dry Law was repealed by the National Prohibition Act, but it was never maintained that the National Act did not apply to the Territory of Alaska. This court in deciding those two cases not only held that the Alaska Dry Law was not repealed by the National Prohibition Act and is, therefore, still in effect, but held distinctly that **both** laws are in effect in Alaska. So that Section 3 of the Act Supplemental to the National Prohibition Act in specifically applying the Volstead Act to Hawaii and the Virgin Islands and "all territory subject to its (the United States') jurisdiction" could not possibly bring the Alaska Dry Law and the National Prohibition Act into any new relationship or conflict whereby the Alaska Dry Law is superseded by the latter.

Section 5 of the Amendment was passed specifically for the purpose of providing that certain laws were NOT REPEALED by the National Prohibition Act and has reference especially to certain Internal Revenue Laws which some of the courts had held were repealed by the National Prohibition Act. The Alaska Dry Law contained no such tax provisions, hence no new construction is needed on that score.

Section 6 provides penalties for searching a private

dwelling without a warrant, making malicious searches, and for impersonating an officer of the United States. If there were anything in the Alaska Dry Law contrary to that provision, the repealing effect of the Amendment would, under the holding of this court in Abbate vs. United States, supra, extend only to the inconsistency or direct conflict. But we hold that there is absolutely no conflict or inconsistency.

Certainly Sections 1 and 4 cannot be claimed to have any repealing effect on the Alaska Dry Law, hence we contend that appellant's contention is entirely without merit.

II.

Error in Admission of Evidence.

Error is assigned upon the action of the trial court in admitting the liquor which had been seized, in evidence, without a search warrant and allowing the witnesses to testify regarding same. The claim is urged under the fourth and fifth amendments of the constitution (Record page 61, 62, 63, 27, 37). As the court well knows the question to be determined is whether the search is an unreasonable one. There is no guarantee in either the fourth or fifth amendments against searches of vehicles, either reasonable or unreason-

able, the protection afforded being given to persons and houses, papers and effects. It was for the court below and for this court here to determine whether the search was an unreasonable one in view of all the facts and the evidence. The evidence shows that Deputy United States marshals Mossman, Watson and Hoffman, on the 21st of September, 1922, about 7 o'clock in the morning, sighted a rowboat with a single occupant (Record page 26, 27). The boat landed at the dock at Anchorage and the occupant came ashore and left immediately, taking the boat back into the stream and going down the Bay three or four miles and landing there (Record page 27). The actions of the occupant of the boat on landing at the dock were suspicious and aroused the suspicions of the officers (Record page 33, 34). Defendant was observed by the officers with a pair of glasses when he landed, carrying something ashore. He also built a fire, (Record page 34). The marshals then proceeded down the Bay to the point where the boat landed and found defendant asleep on the bank, twenty-five or thirty yards from the boat (Record page 36) which was then high and dry on the beach (Record page 28). After observing the defendant, without waking him, two of the officers went to the boat, which was an open dory, (Record page 28). They

found the boat loaded with kegs of whiskey, part of which were uncovered and in plain sight, (Record page 29 and 36) about ninety gallons, (Record page 29 and 36). Defendant stated to witness, deputy marshal Watson, (Record page 40) that he had "a hundred gallons" in the boat.

The question, as stated before, is a judicial one as to whether the acts by which the evidence was obtained constitute an unreasonable search. The evidence shows, as above stated, that the liquor was in the boat which had been used by defendant, near which he was sleeping; that the boat was an open one and the liquor plainly visible. We contend, therefore, that on the statement of facts, which defendant produced no testimony to deny, no search was necessary as the liquor, which constitutes the evidence of crime was in plain sight and could be viewed by anyone who could see. This was the view held by this court and sustained by the following cases decided in the District Courts in this circuit and in this court.

In United States vs. Fenton, 268, Fed. 221, from the District of Montana, which was a charge of transporting in an automobile, the court says:

"An unlawful arrest of an offender does not work

a pardon in his behalf, and seizure without process and by force of government property, of which it is entitled to immediate possession, does not entitle the offender to a return of the property, nor to exclusion of its use in evidence against him. The auto and whiskey, by virtue of the National Prohibition Act (41 Stat. 305), were forfeited, and thereby transferred to the United States, the moment defendants embarked upon the unlawful transportation. The United States was then vested with the right of property and possession. Even as any other owner of property in like circumstances at common law, the United States without process could recover possession by force. And however, if at all, irregularly the officers proceeded, the defendants have no right to return of the property, nor to object to its use in evidence, whatever other, if any, right or remedy they may have."

In Lambert vs. United States 282 Fed. 413, the case of transporting in an automobile. In this case the court says:

"The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. We think the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lambert was at the time actually engaged in the commission of th ecrime defined and denounced by the National Prohibition Act, and that they were therefore justified in arresting him and in seizing the automobile by means of which he was commiting

the offense—just as peace officers may lawfully arrest thugs and burglars, when their actions are such as to reasonably lead the officers to believe that they are actually engaged in a criminal act, without giving the criminals time and opportunity to escape while the officers go away to make application for a warrant."

In United States vs. Bateman, 278 Fed. 231, where an auto was stopped without a warrant, and on a motion for return of the property, seized, the court held:

"It is my opinion, therefore, that it is not unreasonable for a prohibition enforcement officer to stop automobiles upon the public highway and search them for intoxicating liquors without a warrant, and the finding of the liquor justifies the search."

In United States vs. Vatune, 292 Fed. 492 on motion for return of liquor seized without warrant and to quash information, the district court for the Northern District of California, S. D., in a well considered case denied the motion. In the above case the defendant was driving along the street with the liquor well concealed in his auto, according to the testimony of the defendant. The government contended that the liquor was in sight. The court, in denying the motion for return of the liquor used the following language:

"The Fourth Amendment affords inviolable pro-

tection to the people with respect to 'their persons, houses, papers, and effects, against unreasonable searches and seizures.' What is an 'unreasonable' search or seizure is always a judicial question (United States vs. Bateman (D. C.) 278 Fed. 231, 232), and is determinable from a consideration of the circumstances involved. Officers of the government act under legal authority, in pursuance of oath and official station, and it will be presumed, in the absence of countervailing proof, that they have performed their duty—that is, that they have not been guilty, in a given instance, of making an unreasonable search or effecting an unreasonable seizure. The burden of showing the contrary, then, is upon him who contends to the contrary."

We contend that it is apparent from the evidence of the Government that the kegs of whiskey were in plain sight of the officers in the boat and they were justified in seizing it, being a crime committed in their presence. We further contend that the admission of the defendant that he had a "hundred gallons" gave the officers complete evidence and authority upon which to seize the contents of the boat. A search, if required, presupposes the secretion of the article involved, but in this case no search was required; first, because the liquor was in plain sight; second, because of the admission of defendant that he had a hundred gallons.

The court's attention is directed to the fact that this is not a prosecution under the Volstead Act, but

under the Alaska Bone Dry Law. We fail to find in the record any petition for the return of the liquor or its suppression, and we, therefore, contend that the objection, if valid, came too late as the court will not ordinarily interrupt a trial to inquire into any collateral issue.

Error is assigned because the court allowed the witness Watson (Record page 40) to testify to certain statements made by defendant while under arrest, appellant contending that the law of confessions governs such statements. The only testimony covered by the question of arrest is that on Record Page 40 in which appellant's attorney on the trial asked the witness Watson this question:

"Q. Had you placed him under arrest?
A. No sir.

Q. Was he under arrest while you were talking to him?
A. I don't know that I told him he was."

It is apparent from the facts that the appellant at that time had not been taken into custody but the deputy marshal merely stayed with him while the other officers went down to look at the boat. We, therefore, contend that the evidence does not justify the claim of arrest at this time; but if it be contended that there was an arrest, we maintain that its admission was proper and not error.

Reference is again made to the testimony as to what the conversation was (Record page 40).

"Q. What statements, if any, did Mr. Peterson make to you at that time?

A. Well, he was about all in he said; he had been out all night shooting ducks and had no sleep for two days. He was all in; played out.

Q. Did he say anything about what was in the boat?

A. I don't remember whether he said anything about the booze. I don't remember just what it was. Yes, I remember; I said , 'have you anything in the boat,' and he said, 'a hundred gallons.' "

In the case of Perovich vs. United States, 205 U. S. 91, passing upon the same question in a homicide case, the court says:

"Again, it is alleged that there was error in overruling a motion made by defendant to strike out all the testimony given by a deputy marshal of conversations between him and the defendant. As these conversations were not induced by duress, intimidation or other improper influences, but were perfectly voluntary, there is no reason why they should not have been received."

In Wilson vs. United States, 162 U. S. 623, also a homicide case, this question was considered at much greater length than in the case quoted above, and the same conclusion reached, the court saying:

"In the case at bar defendant was not put under

oath, and made no objection to answering the questions propounded. The commissioner testified that the statement was made freely and voluntarily, and no evidence to the contrary was adduced. Nor did defendant when testifying on his own behalf testify to the contrary. He testified merely that the commissioner examined him 'without giving him the benefit of counsel or warning him of his right of being represented by counsel, or in any way informing him of his right to be thus represented.' He did not testify that he did not know that he had a right to refuse to answer the questions, or that, if he had known it, he would not have answered. His answers were explanations, and he appeared not to be unwilling to avail himself of that mode of averting suspicion. It is true that, while he was not sworn, he made the statements before a commissioner who was investigating a charge against him, as he was informed; he was in custody but not in irons; there had been threats of mobbing him the night before the examination; he did not have the aid of counsel; and he was not warned that the statement might be used against him or advised that he need not answer. These were matters which went to the weight or creditability of what he said of an incriminating character, but as he was not confessing guilt but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as matter of law."

Mangum vs. United States, 289 Fed. 213 is a case decided by this court, the principle question under consideration being the admisability of statements made by the defendant. The rule laid down is the same as was announced in the preceding cases,

but in addition to that we desire to call the court's attention to the following statement:

"But where on the trial of a criminal case a confession of the defendant is offered in evidence it becomes necessary for the trial court to ascertain and determine as a preliminary question of fact, whether it was freely and voluntarily made, and whether the previous undue influence, if any, had ceased to operate upon the mind of the defendant. In doing so, the court is necessarily vested with a very large discretion, which will not be disturbed on appeal, unless a clear abuse thereof is shown. State vs. Rogoway, 45 Or. 601, 78 Pac. 987; 81 Pac. 234, 2 Ann. Cas. 431; State vs. Squires, 48 N. H. 364."

The evidence in the case at bar shows conclusively that the statements admitted in testimony were voluntarily made by the defendant and that no duress, intimidation or promises were in any way responsible for them. We therefore contend that the objection to their admission was entirely without merit.

III.

Insufficiency of Evidence.

The evidence in this case has been necessarily covered more or less in the discussion of questions covered in the preceding pages. Appellant's contention raised by Assignment of Error Number 8, states that there was no evidence to prove ownership of the

liquor by appellant; no testimony of ownership of the boat by appellant; and no testimony to connect the defendant with the commission of the offense. It is our contention that the testimony on these points was so conclusive that the only manner in which the jury could have escaped returning a verdict of guilty was to disbelieve all the testimony of all the officers. No testimony was introduced for defendant. The attention of the court, however, is directed to the transcript of evidence bearing on these points. The testimony of the witness Hoffman of the action of appellant at the Anchorage dock (Record page 26); of his going down the Bay about three miles and landing (Record page 27); finding of appellant asleep on the bank (Record page 27); finding the open boat in which he had previously been seen, about sixty feet from where defendant was sleeping, containing ten 10-gallon kegs of "white mule" (Record pages 28, 29 and 30); that the liquor found was intoxicating liquor (Record page 30); to the testimony of witness Mossman as to the actions of appellant in the vicinity of the Anchorage dock (Record page 33, 34); of his going down the Bay and landing; of them seeing him land with the boat on the bank (Record page 34); of going to the place of landing and finding him asleep (Record page 35); finding the boat about 30

yards from appellant and finding ten 10-gallon kegs of whiskey therein (Record page 36); to the testimony of the witness Watson observing a boat in the vicinity of the ocean dock (Record page 38); going down the Bay and landing and building a fire (Record page 39); finding defendant asleep there (Record page 39). Especially the attention of the court is called to the voluntary statement of appellant (Record page 40) in which he said in answer to a question as to whether he had anything in the boat, "a hundred gallons;" and to the statement of witness Watson (Record page 41) that it was white mule whiskey. We contend the ownership of the boat was immaterial. The possession of the boat appellant admitted in a conversation with witness Watson (Record page 40) in which he said he had been out all night shooting ducks and that he had 35 or 40 ducks in the boat; also to witness Hoffman (Record page 31). These facts we contend clearly establish the material elements of guilt and we think the evidence is amply sufficient in all respects for the foundation of the verdict and judgment.

IV.

ERROR OF COURT IN REFUSING PLEA IN BAR

Under his first assignment of error appellant con-

tends for the doctrine of merger. This was sought to be raised before trial by an affidavit in support of plea in bar (Record pages 19 and 23). In the first place the court's attention is called to the fact that no such plea as that attempted to be put in is provided for by the Alaska Code; section 2209 sets forth what pleas may be entered. First, plea of guilty; second, plea of not guilty; third, a plea of former conviction or acquittal in the court, naming it, and place, naming it, and giving the date. In the case at bar, from an inspection of appellant's affidavit, it appears that no trial of any kind had been had. Appellant could neither have been convicted nor acquitted. The doctrine of merger can only apply, if it prevail at all, where one has been tried or acquitted upon a felony which includes a crime of a lesser degree. Nothing is shown by the record as to what became of the case mentioned in defendant's affidavit.

As to the law of merger, 16 Corpus Juris, speaking of merger, page 59, section 10, says:

"Moreover the offenses must be of different grades and the rule does not apply where both offenses are felonies or misdemeanors."

In Vol. 1 Wharton's Criminal Law, page 50, Sec.

39, the same doctrine is laid down, using the following language:

"Merger is said to exist when a lesser offense is absorbed in a greater, but in criminal practice the only case in which such absorption is claimed to be operative is when a misdemeanor is an ingredient of a felony, in which case the older authorities maintain that the trial must be exclusively for the felony, and that the defendant cannot, under an indictment for felony, be convicted of misdemeanor."

Section 1, third sub-division of the Alaska Dry Law, under which this action is brought, makes possession of liquor a misdemeanor providing not more than one year's imprisonment or more than $1000.00 fine or both. The same section makes transportation of liquors a misdemeanor with the same penalty. By reference to defendant's affidavit (Record page 19 and 20) he alleges he is held to answer before the grand jury on a charge of unlawfully transporting liquors under the National Prohibition Act. Since there is no showing that it is a second offense charged, the penalty under section 29 is a fine of $500.00 and no imprisonment. Therefore, both offenses are misdemeanors and there is no merger.

In Berkowitz, 93 Fed. Rep. 452, in the Third Circuit, defendant was accused of conspiracy to utter false naturalization certificates. He was acquitted.

He was later accused of the offense of uttering in the same transaction and pled in bar his former acquittal. The court over-ruled the plea saying:

"The doctrine of merger is not applicable as between misdemeanors."

In Brewster vs. State, (Ind.) 115 N. E. 54, the defendant and others were accused of a conspiracy to burn a building, the evidence tending to show that defendant was also guilty of the crime of arson. In other words the object of the conspiracy was consummated and merger was contended for, and the court held:

"The doctrine of merger of offenses can have no application where, as in this case, the two crimes are of equal grade and it rests with the State to elect which it will prosecute."

CONCLUSION

For the reasons above stated we respectfully urge this Honorable Court to sustain the verdict and judgment of the Court below.

Respectfully submitted,

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